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No. 08-322

IN THE
Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE,

Appellant,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR INTERVENOR-APPELLEES TEXAS STATE CONFERENCE OF NAACP BRANCHES, AUSTIN BRANCH OF THE NAACP, AND NATHANIEL LESANE

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QUESTIONS PRESENTED

1. Whether a municipal utility district that does not register voters is a "political subdivision" eligible to invoke the bailout provision in Section 4(a) of the Voting Rights Act even though the Act's plain language limits such "political subdivision[s]" to counties, parishes, and entities "which conduct[] registration for voting."

2. Whether Congress acted within the scope of its enforcement powers under the Fourteenth and Fifteenth Amendments when it reauthorized Section 5 of the Voting Rights Act in 2006, in light of an extensive legislative record of persistent unconstitutional discrimination against minority voters in covered jurisdictions and years of experience with the Act indicating that a failure to renew Section 5 would result in loss of advancements made in the elimination of discrimination against minority voters.

CORPORATE DISCLOSURE STATEMENT

The Austin Branch of the NAACP and the Texas State Conference of NAACP Branches are nongovernmental corporations. They have no parent corporations and no stock.

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STATEMENT OF THE CASE

The Voting Rights Act of 1965 is one of the most important civil rights measures in American history and is widely credited with giving force to the constitutional right of all citizens to vote free from racial discrimination. Appellant seeks to strike down Section 5, which this Court has aptly described as the very "heart" of the Act. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 315 (1966). That would be a mistake of historic proportions.

Congress most recently reauthorized Section 5 in 2006 after holding more than 20 hearings and examining a record that exceeded 15,000 pages. With overwhelming support from both parties and from most of the jurisdictions that Section 5 covers, Congress concluded that, although Section 5 has accomplished much since its initial enactment in 1965, its protections remain necessary to safeguard existing gains and to finish breaking down centuries-old obstacles to political participation by racial minorities.

In this area, where Congress acts to remedy and deter official racial discrimination in the narrow context of voting rights, the Fifteenth Amendment grants Congress broad discretion to determine what enforcement mechanisms are most appropriate. Appellant, however, contends that Section 5 could have been validly reauthorized only if conditions in jurisdictions subject to its requirements were substantially the same now as they were in 1965. Put differently, Appellant believes that Congress could validly reauthorize enforcement legislation under the Fifteenth Amendment only if the legislation has been ineffective.

This Court should reject that argument, unsupported as it is by any authority, and instead should re-

affirm the constitutionality of this bedrock civil rights guarantee, as it has done on four prior occasions. Section 5's track record of *progress* does not mean that in those parts of the country, such as Appellant's home state of Texas, where discrimination has been most difficult to uproot, official racial discrimination in voting is now a thing of the past. Nor does it mean that there would no longer be a serious risk of backsliding in the absence of Section 5. To the contrary, the record before Congress in 2006 revealed that racial discrimination remains an ongoing and serious problem for minority voters in the covered jurisdictions. Congress acted well within its enforcement powers in reauthorizing Section 5 to preserve gains made thus far and to complete the task, set forth by the Fifteenth Amendment, of eliminating race discrimination in voting.

I. THE VOTING RIGHTS ACT

A. The Origins Of The Voting Rights Act

In the aftermath of the Civil War, Congress proposed and the States ratified three constitutional amendments to ensure that former slaves and their descendants would take their rightful place as full and equal citizens. In 1865, the Thirteenth Amendment ended the long and shameful history of legalized slavery in the United States. Three years later, the States ratified the Fourteenth Amendment, which included a guarantee that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The "sentiment … soon came to prevail … that the ballot was absolutely essential to [the freedmen's] protection against oppression and wrong in a thousand forms where the general law would be powerless," 2 Joseph Story, *Commentaries on the Constitution of the United States* 688 (4th ed. 1873),

and that the Fourteenth Amendment might not itself suffice for that task. Congress thus proposed the Fifteenth Amendment, which the States ratified in 1870. The Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1. Section 2 of the Amendment gives Congress the "power to enforce this article by appropriate legislation." *Id.* § 2.

Despite the Fifteenth Amendment's passage, many States and local governments—particularly those in the former Confederacy—devised numerous methods for denying the franchise to racial minorities. "These included grandfather clauses, property qualifications, 'good character' tests," white primaries, literacy tests, racial gerrymanders, and interpretation requirements. *Katzenbach*, 383 U.S. at 311. As a result, African-American voting rates in the former Confederate States dropped precipitously. *See, e.g.*, *Louisiana* v. *United States*, 380 U.S. 145, 147-149 (1965) (noting that beginning with the adoption of the Louisiana Constitution of 1898, the State implemented a policy of denying African-American citizens the right to vote such that from 1898 to 1944, the percentage of registered African-American voters declined from 44% to 0.2%); *United States* v. *Mississippi*, 380 U.S. 128, 144 (1965).

After nearly a century of such disenfranchisement, Congress enacted a series of statutes—the Civil Rights Acts of 1957, 1960, and 1964—each of which sought to "facilitat[e] case-by-case litigation" against voting discrimination. *Katzenbach*, 383 U.S. at 313. But this approach proved unequal to the task of "solv[ing] the voting discrimination problem." S. Rep. No. 89-162, pt. 3, at 6 (1965). As this Court observed: "Voting suits are

unusually onerous to prepare …. Litigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials and others involved[.]" *Katzenbach*, 383 U.S. at 314.

In response, Congress decided to implement "sterner and more elaborate measures," *Katzenbach*, 383 U.S. at 309, "aimed at areas where voting discrimination ha[d] been most flagrant," *id.* at 315. The result was the passage of the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, codified as amended at 42 U.S.C. §§ 1973 *et seq.* (VRA or Act).

B. The Operation Of Section 5

1. Section 5's preclearance rules

Jurisdictions covered by Section 5 may not implement any change in a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," 42 U.S.C. § 1973c(a), without obtaining "preclearance." Preclearance may be obtained in either of two ways. First, a jurisdiction may file a declaratory judgment action in the United States District Court for the District of Columbia. *Id.* Second, as a more expeditious alternative, a jurisdiction may submit the proposed change to the Department of Justice for administrative preclearance. *Id.*; *see generally* 28 C.F.R. §§ 51.1 *et seq.* DOJ must interpose any objection to a proposed voting change within a sharply limited time period—60 days after a submission is completed—or else the proposed change is deemed precleared. *See* 42 U.S.C. § 1973c(a); 28 C.F.R. §§ 51.1(a)(2), 51.9, 51.37, 51.39. In either forum, the jurisdiction must show that the proposed change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color" or on account of language

minority status. Until the proposed change is precleared, it is unenforceable. *See* 28 C.F.R. § 51.1(a).[1]

2. Scope of Section 5 coverage

Section 5 applies to jurisdictions with particularly egregious histories of, and ongoing problems with, racial discrimination in voting. Section 5's coverage extends both to some States as a whole and, in a few States that are not themselves covered, to designated "political subdivisions" of those States. Section 14(c)(2) of the Act defines a "political subdivision" as "any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting." 42 U.S.C. § 1973*l*(c)(2). If a State or political subdivision is covered, then all governmental subunits within the jurisdiction are generally subject to the preclearance requirements. 28 C.F.R. § 51.6. Under the coverage formula,[2] the jurisdictions covered include

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[1] Section 5 is part of a complex statutory scheme designed to "banish the blight of racial discrimination in voting." *Katzenbach*, 383 U.S. at 308. The scheme includes, among other provisions, Section 2 of the VRA, 42 U.S.C. § 1973, which contains the Act's nationwide prohibition on voting discrimination. The various provisions work in tandem. Thus, for example, when a Section 5 covered jurisdiction is required to change its method of election as a result of Section 2 litigation, Section 5 ensures that the jurisdiction cannot undo minority electoral progress through subsequent voting changes.

[2] Under the statutory coverage formula for Section 5, a jurisdiction is covered if, at the time of the 1964, 1968, or 1972 presidential election, (1) the jurisdiction maintained a "test or device" for voting or registration, and (2) the jurisdiction had less than a 50% voter registration rate or fewer than 50% of the eligible population

nine States—Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia—and one or more political subdivisions in seven States—California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota. *See id.* pt. 51 app. In the remaining thirty-four States, there are no covered jurisdictions.

3. Adjustments to coverage

Although Congress devised Section 5's coverage formula to reach those jurisdictions with the most egregious voting-related discrimination problems, it also recognized the need for flexibility in the Act's coverage, in part to give covered jurisdictions an incentive to protect minority voting rights. To alleviate over-inclusiveness, Congress provided a "procedure for exemption from" Section 5's preclearance obligations: the "so-called 'bailout' provision." *City of Rome* v. *United States*, 446 U.S. 156, 167 (1980). A State or political subdivision may "bail out" by establishing that it satisfies certain criteria set forth at 42 U.S.C. § 1973b(a)(1). Under the current bailout provision (in place since the 1982 amendments took effect), every one of the fourteen jurisdictions that has applied has, with the Attorney General's support, successfully secured bailout. J.S. App. 140.

Congress also included a provision to address under-inclusiveness. Under the "bail-in" provision, a

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actually voted in the presidential election. 42 U.S.C. § 1973b(b). In 1975, Congress expanded Section 5 to include jurisdictions with a history of voting discrimination against "persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage." *Id.* § 1973*l*(c)(3).

court may subject a non-covered jurisdiction to preclearance requirements if the court finds "that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred" within that jurisdiction. 42 U.S.C. § 1973a(c); *see, e.g.*, *Jeffers* v. *Clinton*, 740 F. Supp. 585, 599-601 (E.D. Ark. 1990).

C. This Court's Prior Decisions Sustaining Section 5 As Initially Enacted And As Reauthorized

This Court has repeatedly sustained Section 5's constitutionality, upholding it as initially enacted and after each of the three reauthorizations prior to 2006.

After Congress enacted the VRA in 1965, South Carolina, supported by Alabama, Georgia, Louisiana, Mississippi, and Virginia, immediately challenged the Act, arguing that Congress had exceeded its Fifteenth Amendment enforcement powers. *See Katzenbach*, 383 U.S. at 307-308 & n.2. This Court rejected the States' challenge, holding that the sections of the Act before it, including Section 5, were "an appropriate means for carrying out Congress' constitutional responsibilities and [we]re consonant with all other provisions of the Constitution." *Id.* at 308. The Court concluded that Section 5 was justified by the particularly egregious history and firmly rooted practice of voting discrimination in covered jurisdictions. *See id.* at 329-331, 334-335.

Following the "dramatic rise in registration" after the Act's 1965 passage, "a broad array of dilution schemes were employed to cancel the impact of the new black vote." S. Rep. No. 97-417, at 6 (1982). "Their common purpose and effect [was] to offset the gains made at the ballot box under the Act." *Id.* Against this backdrop, Congress reauthorized Section 5 in 1970. In

a challenge brought after the 1970 reauthorization, this Court "reaffirm[ed]" that Section 5 "is a permissible exercise of congressional power under § 2 of the Fifteenth Amendment." *Georgia* v. *United States*, 411 U.S. 526, 535 (1973).

In 1975, following additional hearings, Congress determined "that it is largely Section 5 which has contributed to the gains thus far achieved in minority political participation, and it is likewise Section 5 which serves to insure that that progress not be destroyed through new procedures and techniques." H.R. Rep. No. 94-196, at 11 (1975); *see also* S. Rep. No. 94-295, at 19 (1975) (same). In addition to reauthorizing the Act's temporary provisions, Congress extended the VRA's coverage to protect Latinos, Native Americans, and Asian Americans (referred to collectively in the Act as language minorities), concluding "after extensive hearings that there was 'overwhelming evidence' showing 'the ingenuity and prevalence of discriminatory practices that have been used to dilute the voting strength and otherwise affect the voting rights of language minorities.'" *Briscoe* v. *Bell*, 432 U.S. 404, 405-406 (1977) (citations omitted); *see also* S. Rep. No. 94-295, at 25-27. Texas (and all of its governmental subunits) became covered under Section 5 as a result of the language-minority amendment. *See* Bureau of the Census, *Voting Rights Act Amendments of 1975*, 40 Fed. Reg. 43,746, 43,746 (Sept. 23, 1975).

After the 1975 reauthorization, the City of Rome, Georgia, challenged Section 5's constitutionality. *See Rome*, 446 U.S. 156. This Court again sustained Section 5's constitutionality, holding that viewed in light of "95 years of pervasive voting discrimination" and the evidence of ongoing voting discrimination against racial minorities, "the Act … was plainly a constitutional

method of enforcing the Fifteenth Amendment." *Id.* at 180-182.

In 1982, Congress again conducted an in-depth examination of whether Section 5 should be renewed. The extensive record it compiled reflected that "discrimination continues today to affect the ability of minorities to participate effectively within the political process." H.R. Rep. No. 97-227, at 11 (1981). Congress reauthorized Section 5, and in *Lopez* v. *Monterey County*, 525 U.S. 266, 282-285 (1999), this Court once more reaffirmed Section 5's constitutionality.

D. The 2006 Reauthorization

In 2005 and 2006, against the backdrop of this Court's decisions sustaining Section 5's constitutionality, Congress considered whether to reauthorize the Act's temporary provisions, including Section 5, which were scheduled to expire in 2007. The House held 12 hearings on the subject and received oral testimony from 46 witnesses, written testimony from DOJ and other organizations and witnesses, and 13 extensive reports analyzing voting-related discrimination over the previous 25 years. H.R. Rep. No. 109-478, at 5 (2006). The Senate also conducted an extensive investigation, holding nine hearings and considering the testimony of 46 witnesses. S. Rep. No. 109-295, at 10 (2006). In total, Congress compiled a record "of over 15,000 pages." *Id.*

Following its examination of the record, Congress found that "without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by mi-

norities in the last 40 years." Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(b)(9), 120 Stat. 577, 578 (VRARA). The evidence revealed, for example, "that more Section 5 objections were lodged between 1982 and 2004 than were interposed between 1965 and 1982 and that such objections did not encompass minor inadvertent changes. The changes sought by covered jurisdictions were calculated decisions to keep minority voters from fully participating in the political process." H.R. Rep. No. 109-478, at 21; *see also id.* at 36-40.

Other evidence relied on by Congress included (1) the volume of preclearance requests that were withdrawn after DOJ sent the submitting jurisdiction a "more information request," (2) Section 5 enforcement actions by DOJ and private plaintiffs in covered jurisdictions, (3) declaratory judgment requests for preclearance that were denied, (4) continued Section 2 violations and litigation in covered jurisdictions, (5) DOJ lawsuits to enforce Section 203 of the Act, which mandates language assistance in voting, (6) the "continued evidence of racially polarized voting in each of the [covered] jurisdictions," (7) the continued need for federal election observers in several covered jurisdictions, (8) racial disparities in registration rates, and (9) uneven and disproportionately low number of minority elected officials. *See* Pub. L. No. 109-246, § 2(b)(3), (4), (5), 120 Stat. at 577-578; H.R. Rep. No. 109-478, at 25-36, 40-53. Congress also found that Section 5 has been a "vital prophylactic tool[]" that has "deterred covered jurisdictions from even attempting to enact discriminatory voting changes." H.R. Rep. No. 109-478, at 21, 24.

During the 2006 legislative deliberations, a coalition of state and local government organizations repre-

senting thousands of jurisdictions, including covered jurisdictions, urged Congress to reauthorize the Act's temporary provisions. These jurisdictions explained that, "[w]hile substantial progress has been made since passage of the Voting Rights Act in 1965, it has not yet resulted in the elimination of voting discrimination." 152 Cong. Rec. H5143, H5146 (daily ed. July 13, 2006) (Letter from Council of State Governments, National Conference of State Legislatures, National Association of Secretaries of State, National Association of Counties, National League of Cities, and U.S. Conference of Mayors). Over the course of the entire reauthorization process, not a single witness representing a covered jurisdiction testified against reauthorizing Section 5.

In the vote on the VRARA, Section 5's reauthorization likewise received decisive bipartisan support, including widespread support from delegations representing States covered by Section 5. The Senate passed the VRARA unanimously. 152 Cong. Rec. S7949, S8012 (daily ed. July 20, 2006). House members from fully-covered States voted 68 to 18 in favor of reauthorization, and House members from partially-covered States voted likewise 128 to 8. *See* 152 Cong. Rec. H5143, at H5207. The full vote in the House was 390 to 33. *Id.*

On July 27, 2006, President George W. Bush signed the VRARA into law.

II. PROCEDURAL HISTORY

Appellant Northwest Austin Municipal Utility District Number One is a local governmental entity in Travis County, Texas. Appellant is governed by a Board of Directors elected by qualified voters residing within its borders. Since Appellant's formation in the

1980s, Travis County has conducted all voter registration of individuals who reside within the utility district. J.S. App. 18, 22.

Eight days after the VRARA became law, Appellant filed this suit, seeking either a bailout from Section 5 coverage or, in the alternative, a declaration that Section 5 as reauthorized in 2006 exceeds Congress's constitutional enforcement powers because it fails the congruence-and-proportionality standard described in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997).[3] J.S. App. 19. Travis County, eleven individuals resident in the utility district, three individuals resident elsewhere in Texas, and three civil rights organizations intervened as defendants. J.S. App. 19-20. A three-judge panel of the United States District Court for the District of Columbia heard the case.

The district court granted the Attorney General's and the intervenors' motions for summary judgment and denied Appellant's cross-motion. The court first held that Appellant may not bail out because only States and "political subdivisions" are eligible to seek bailout and Appellant is not a political subdivision. The court held that Section 14(c)(2) of the Act defines the term "political subdivision" and encompasses only counties, parishes, and other subdivisions within a

[3] The *Boerne* framework requires a reviewing court to engage in three inquiries. First, the Court must identify the constitutional right or rights that Congress sought to enforce by enacting the legislation in question. *See Tennessee* v. *Lane*, 541 U.S. 509, 522 (2004). Second, the Court must examine the "gravity of the harm [the legislation] seeks to prevent." *Id.* at 523. Third, the Court must determine whether the statute in question is "an appropriate response" to the harms identified. *Id.* at 530.

State that—unlike Appellant—register voters. J.S. App. 20-30.

The district court also rejected Appellant's constitutional challenge. The court concluded that under *Katzenbach* and later cases considering the VRA's constitutionality, the appropriate inquiry for the courts is whether Section 5's reauthorization was a "'rational means to effectuate the constitutional prohibition of racial discrimination in voting,'" (J.S. App. 35 (quoting *Katzenbach*, 383 U.S. at 324)), instead of the congruence-and-proportionality analysis applied in *Boerne* to legislation enacted under the Fourteenth Amendment. J.S. App. 45-56. The court nonetheless evaluated Section 5 as reauthorized in the VRARA under both the *Katzenbach* standard and the congruence-and-proportionality test, holding that under either standard, Section 5 remains constitutional. J.S. App. 2, 122, 124-128, 133-134.

SUMMARY OF ARGUMENT

I. Appellant is ineligible for bailout because it is not a "political subdivision" within the meaning of the bailout provision contained in Section 4(a) of the Act. "Political subdivision" is defined in Section 14(c)(2) of the Act as "any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting." 42 U.S.C. § 1973*l*(c)(2). That definition applies to the use of the term in Section 4(a), as this Court confirmed in *Rome*. Appellant's contrary interpretation would give rise to a host of anomalies: It would render surplusage an important clause Congress included in Section 4(a); it would give the term two different meanings within this single statutory provision;

it would strip the term "governmental unit" (used in Section 4(a)) of any independent meaning; and it would arbitrarily confer bailout eligibility on municipalities, school districts, and special purpose districts within covered States, but not on those within covered counties in non-covered States.

II. This Court's decisions over the last four decades, taken together with the 2006 reauthorization's extensive legislative record, confirm that Section 5 remains constitutional.

The Court has sustained Section 5's constitutionality four times, including as recently as a decade ago. In each case—*Katzenbach*, *Georgia*, *Rome*, and *Lopez*—the Court has deferentially reviewed Congress's judgment that Section 5 is needed to protect minority voters in the covered jurisdictions—those with an entrenched history of discrimination in voting. *Stare decisis* considerations weigh decisively in favor of similar respect for Congress's judgment here, particularly since, in 2006, Congress reauthorized this provision on the understanding that this Court has repeatedly found it constitutional. And far from displacing this precedent, *Boerne* and its progeny repeatedly cite Section 5 as the paradigm of valid enforcement legislation under the Civil War Amendments.

A strong presumption that Section 5 remains constitutional is further warranted because Section 5 targets the evil that the Fifteenth Amendment clearly gives Congress power to prevent: official racial discrimination in the specific context of voting. Congress's authority to fashion remedies is at its zenith in a case, such as this one, where the legislation seeks both (1) to eliminate discrimination based on the most suspect factor in American jurisprudence (race) and (2) to vindi-

cate the most fundamental civil right (the franchise). Section 5 thus does not implicate the concern animating the Court's use of a more skeptical review in *Boerne* and some subsequent cases—the danger that Congress might try to redefine one of the many rights of potentially broad application that the Fourteenth Amendment makes directly applicable to, or incorporates against, the States. *Boerne* itself, for example, reflected this Court's express concern that Congress was attempting to re-impose, through legislation, a broad interpretation of the Free Exercise Clause that the Court had recently rejected. No comparable concern is presented here.

On the merits, and under any standard of review, the massive record before Congress in 2006 justified Congress's reauthorization of Section 5. The record reveals that, although much progress has undeniably been made since 1965, official discrimination in voting persists in the covered jurisdictions. Hundreds of DOJ objections (including many on the basis of discriminatory intent), lagging minority electoral representation in the covered jurisdictions, ongoing racial disparities in voting, and a wide variety of other categories of evidence all provided more than an ample basis for Congress's considered judgment that Section 5's prophylactic rules remain necessary in Texas and the other covered jurisdictions.[4]

[4] We fully concur in the brief for the Louis Intervenors, which covers this legislative record in persuasive detail.

ARGUMENT

I. APPELLANT IS NOT ELIGIBLE FOR BAILOUT

A. The Statute's Text, Structure, And Legislative History Show Appellant Is Ineligible For Bailout

As originally enacted, the VRA allowed only covered States or separately covered political subdivisions in non-covered States to bail out from Section 5. In *Rome*, this Court upheld that arrangement, concluding that Section 5 was constitutional even though the statute at the time did not allow any governmental units within a fully covered State to apply for bailout. 446 U.S. 156, 167 (1980). The Court rejected an argument, advanced by Justice Powell in dissent, that Section 5 would be constitutional only if every governmental subunit within a covered State that was required to preclear its voting changes were eligible for bailout. *Id.* at 203 (Powell, J., dissenting).

During the 1982 reauthorization, Congress decided to expand the number of jurisdictions eligible to seek bailout. Nonetheless, Congress decided to limit eligibility to States and "political subdivisions," whether or not separately covered. *See* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(b)(2), 96 Stat. 131; 42 U.S.C. § 1973b(a)(1)(A)-(D), (F) & (3)-(4). Appellant is not a State, and as explained below, it is also not a "political subdivision" under the statute.

"[P]olitical subdivision" is defined in Section 14(c)(2) of the Act as "any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting." 42 U.S.C. § 1973*l*(c)(2). Because Appellant is neither a county nor a parish, and

because Travis County conducts voter registration for Appellant, Appellant is not a "political subdivision" under the plain language of Section 14. Given this statutory definition, Appellant's reliance on dictionaries and other interpretive sources (Br. 16-17) is misplaced. *See Rowland* v. *California Men's Colony*, 506 U.S. 194, 200 (1993). The legislatively provided definition must apply throughout the statute, *see id.*, except in those instances where there is some clear indication to the contrary, *see Smith* v. *Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 592-593 (9th Cir. 1997) (noting that statutory purpose and legislative history make clear Congress did not intend Section 14(c)(2)'s definition of political subdivision to apply to Section 2 of the VRA).

The structure of the bailout provision, along with its legislative history, confirms that Section 14(c)(2)'s definition of political subdivision applies in the bailout context. As the district court noted, Appellant's interpretation of the term "political subdivision" in Section 4(a) would render part of that subsection surplusage. J.S. App. 24-25. Section 4(a) confers bailout eligibility on "any political subdivision of [a covered] State … *though [coverage] determinations were not made with respect to such subdivision as a separate unit*." 42 U.S.C. § 1973b(a)(1) (emphasis added). The clear import of the second clause is to extend bailout eligibility not just to separately covered "political subdivisions" of *non*-covered States, but also to non-separately-covered "political subdivisions" of *covered* States—and no further. Had Congress intended to make all of a jurisdiction's political subunits eligible for bailout, it could easily have drafted the provision to say so, and there would have been no need for Congress to specify that a

jurisdiction need not have been separately designated for coverage in order to bail out.

Further, Appellant's interpretation would anomalously give the phrase "political subdivision" two different meanings in Section 4(a). That provision uses the phrase "political subdivision" twice: first, as noted above, in providing that political subdivisions not separately covered may bail out, and second, in stating that "political subdivisions" that have been separately covered are eligible to bail out. 42 U.S.C. § 1973b(a)(1). But since only jurisdictions that meet Section 14(c)(2)'s definition can be separately covered, the second usage of "political subdivision" must refer only to counties, parishes, and political subunits that register voters. And a term that appears twice in a single statutory provision should be construed, if possible, to have one meaning rather than two. *See Wisconsin Dep't. of Revenue* v. *William Wrigley, Jr., Co.*, 505 U.S. 214, 225 (1992). Here, that requires application of the Section 14(c)(2) definition to Section 4(a) both times "political subdivision" appears in that provision.

Moreover, Section 4(a) refers to a "State or political subdivision and all governmental units within its territory." 42 U.S.C. § 1973b(a)(1)(D), (F). If possible, independent meaning should be given to the phrase "governmental units," which Congress clearly perceived as distinct from "political subdivision[s]." The district court's reading gives that term independent meaning by recognizing that there are "governmental units," like Appellant, *within* "political subdivisions" that must preclear voting changes, but are not themselves eligible for bailout. Appellant, having given the phrase "political subdivision" two different meanings, would give the term "governmental unit" no distinct meaning at all.

Finally, Appellant's interpretation would also create a jarring practical anomaly in the application of the bailout provision. Section 4(a) permits bailout for "political subdivisions" of *States*, but not for any entity falling *within separately covered "political subdivisions.*" Thus, under Appellant's reading, a municipal utility district in Texas could bail out of Section 5 coverage, but a similar special purpose district in a separately covered county in a non-covered State like California could not. There is no reason to believe that Congress created such an arbitrary regime.

The legislative history of the 1982 reauthorization further confirms that Section 14(c)(2)'s definition applies to bailout. The 1981 House Report states that the "standard for bail-out is broadened to permit political subdivisions, *as defined in Section 14(c)(2)* … to bail out although the state itself may remain covered." H.R. Rep. No. 97-227, at 2 (1981) (emphasis added); *see also id.* at 39. The Senate Report not only contains similar language, S. Rep. No. 97-417, at 2, 69 (1982), but also specifically explains this limitation as a "logistical limit." As that Report explains, if every sub-county level political subunit were eligible to seek separate bailout, "we could not expect that the Justice Department or private groups could remotely hope to monitor and defend the bailout suits." *Id.* at 57 n.192. The Senate Report adds that "[f]ew questioned the reasonableness and fairness of this cutoff in the House." *Id.*

The legislative history of the 2006 reauthorization confirms the same conclusion. After two witnesses testified that Congress should expand the scope of the bailout provision to include entities other than political subdivisions, Congress made no changes to that provision. J.S. App. 28. Moreover, the 2006 reauthorization came against the backdrop of longstanding DOJ regula-

tions, *see* Department of Justice *Revision of Procedures for the Administration of Section 5 of the Voting Rights Act of 1965*, 52 Fed. Reg. 486, 491 (Jan. 6, 1987) (codified at 28 C.F.R. §§ 51.2, 51.5), that specifically provide that only "[p]olitical subdivision[s]" as defined in Section 14(c)(2) may seek to bail out from Section 5 coverage. The text, structure, and legislative history of the Act thus clearly point to the conclusion that Appellant is not an entity independently eligible for bailout. Of course, Appellant's preclearance obligations would end if either Texas or Travis County successfully bailed out of coverage.

B. Appellant's Remaining Arguments Are Foreclosed By *Rome*

Appellant argues (Br. 18-20) that language in *United States* v. *Board of Commissioners of Sheffield*, 435 U.S. 110, 130 n.18 (1978), and *Dougherty County Board of Education* v. *White*, 439 U.S. 32, 43-44 (1978), suggests that the only purpose of the definition of "political subdivision" in Section 14 of the Act is to specify which jurisdictions may be covered under Section 5 separately from their States—not to identify those entities that are eligible for bailout. That is incorrect. As this Court explained in *Rome*, "*Sheffield* … did *not* hold that cities [that do not register voters] are 'political subdivisions' under §§ 4 and 5." 446 U.S. at 168 (emphasis added). Indeed, *Sheffield* "did not even discuss the bailout process." *Id.* *Dougherty County* likewise did not address bailout. Rather, both *Sheffield* and *Dougherty County* concerned the reach of Section 5's preclearance requirement and made clear that governmental subunits within covered States are subject to that requirement because they lie within those States, not because they fall within the definition of "political

subdivision" in Section 14(c)(2). In contrast, the Court *did* address the scope of bailout in *Rome*. The Court relied on the statutory definition in Section 14(c)(2) and reasoned that, "under the express statutory language," the City of Rome was "not a 'political subdivision' for purposes of § 4(a) 'bailout.'" *Id.*

As noted, the 1982 reauthorization—which post-dated *Sheffield*, *Dougherty County*, and *Rome*—expanded bailout to reach "political subdivisions" within *covered* States (and not just those within non-covered States). *See* Pub. L. No. 97-205, 96 Stat. 131. But it left unaltered *Rome*'s approach to defining "political subdivision" in the bailout provision. It certainly does not follow from Congress's decision to extend bailout eligibility that Congress meant to extend the term "political subdivision" far beyond the express statutory definition, as Appellant contends. J.S. App. 23-25, 30. Indeed, since *Rome* had already made clear that *Sheffield* does not govern bailout, Congress had no need to explicitly "incorporate §14(c)(2)'s restrictive definition" (Br. 21) in the bailout provision itself to make clear that this statutory definition controls.[5]

Appellant also claims (Br. 26) that the district court's interpretation of bailout "interferes with and reorders" Texas state government. That argument lacks merit. Before 1982, a subunit's preclearance obligations could be terminated only if a bailout was independently obtained by the State (or separately covered political subdivision) in which the subunit was located.

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[5] Because Appellant fails to show that *Sheffield* or *Dougherty County* raises any ambiguity as to the scope of bailout eligibility, the canon of constitutional avoidance has no application. *See Clark* v. *Martinez*, 543 U.S. 371, 385 (2005).

This Court upheld that arrangement as constitutional in *Rome*. 446 U.S. at 167. In 1982, Congress *expanded* bailout eligibility to jurisdictions that had not previously been eligible (while nonetheless limiting eligibility to States, counties, parishes, and other entities that register voters). That expansion of eligibility does not raise federalism concerns—if anything, it eases them. Accordingly, Appellant's statutory argument should be rejected.

II. SECTION 5 REMAINS CONSTITUTIONAL

A. Under The Court's Precedents, A Deferential Standard Governs Judicial Review Of Congress's Decision To Reauthorize Section 5

1. *Stare decisis* considerations weigh decisively in favor of deferential review

"When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed." *City of Boerne* v. *Flores*, 521 U.S. 507, 536 (1997). This Court's prior decisions upholding Congress's original enactment and later reauthorizations of Section 5 have consistently applied a deferential standard of review in evaluating whether the statute falls within the scope of Congress's enforcement authority under Section 2 of the Fifteenth Amendment. The Court should follow a similar approach here.

After Congress enacted the VRA, South Carolina argued that the Act, including Section 5, exceeded Congress's powers. *South Carolina* v. *Katzenbach*, 383

U.S. 301, 323 (1966). The Court rejected that challenge. It observed that under the Fifteenth Amendment, Congress has "full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting," *id.* at 326, and that the "Fifteenth Amendment supersedes contrary exertions of state power," *id.* at 325. The Court explained that the States' ordinary plenary authority over matters "'wholly within the domain of state interest'" is qualified when state power has been "'used as an instrument for circumventing a federally protected right.'" *Id.* (quoting *Gomillion* v. *Lightfoot*, 364 U.S. 339, 347 (1960)).

Assessing whether "Congress [had] exercised its powers under the Fifteenth Amendment in an appropriate manner with relation to the States," *Katzenbach*, 383 U.S. at 324, the Court stated that the "ground rules" for resolving the question were "clear…. As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." *Id.* The Court explained that "[t]he basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in … cases" involving legislation under the Necessary and Proper Clause, and that "Chief Justice Marshall laid down the classic formulation" of that test in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), "50 years before the Fifteenth Amendment was ratified." 383 U.S. at 326. Specifically, "'[l]et the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.'" *Id.* (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 421). As the Court had explained the previous Term, the Necessary and Proper Clause authorizes

congressional action when "legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary." *Katzenbach* v. *McClung*, 379 U.S. 294, 303-304 (1964).[6]

In its application of this "rational means" standard, the Court in *South Carolina* v. *Katzenbach*, 383 U.S. at 308, explained that "[t]he constitutional propriety of the Voting Rights Act … must be judged with reference to the historical experience which it reflects." And the Court concluded that Congress's enactment of Section 5 was justified by the exceptional history of voting-related racial discrimination in the covered jurisdictions. *Id.* at 309-315, 329-331, 334-335. The Court held that the coverage formula was "rational," *id.* at 330, and sustained Section 5's statutory preclearance rules as appropriate enforcement legislation, *id.* at 334-335.

In its later decisions addressing the validity of Section 5 as reauthorized, the Court has reaffirmed both Section 5's constitutionality and the deferential review standard set forth in *South Carolina* v. *Katzenbach*. First, after the 1970 reauthorization, the Court held in *Georgia* v. *United States*, 411 U.S. 526, 535 (1973), that "for the reasons stated" in *Katzenbach*, the "Act [was] a permissible exercise of congressional power under § 2 of the Fifteenth Amendment."

The Court followed the same approach when, after Congress reauthorized the VRA in 1975, the City of

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[6] *See also Tennessee* v. *Lane*, 541 U.S. 509, 555 (2004) (Scalia, J., dissenting) (describing the "necessary and proper" standard as "flexible"); *Lopez* v. *Monterey County*, 525 U.S. 266, 294 (1999) (Thomas, J., dissenting) (describing Congress's authority under the Necessary and Proper Clause as "broad").

Rome, Georgia, brought another challenge to Section 5. The City argued that the VRA exceeded Congress's Fifteenth Amendment enforcement power in two key respects. First, it argued that the Act unconstitutionally prohibited voting practices that were only discriminatory *in effect* and therefore impermissibly expanded the Amendment's prohibition against *purposeful* racial discrimination in voting. *Rome*, 446 U.S. at 173. Second, the City argued that the Act violated principles of federalism. *Id.* at 178.

The *Rome* Court rejected both challenges. Again invoking the *Katzenbach* "any rational means" and *McCulloch* "necessary and proper" standards, *Rome*, 446 U.S. at 175, 177, the Court reasoned that Congress had acted "rationally" and therefore "appropriate[ly]" by prohibiting jurisdictions with a past history of purposeful voting discrimination from implementing voting changes with even a discriminatory impact, *id.* at 177. The Court relied for that conclusion in part on *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), which had unanimously upheld a provision of the VRA imposing a nationwide ban on literacy tests whether or not a given test was imposed for a discriminatory purpose.[7] Turning to the

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[7] In *Mitchell*, the Court held that, even though the use of such tests without a discriminatory intent had been held not to violate the Fifteenth Amendment, Congress could "rationally have determined" that a ban on all literacy tests was an "appropriate method[] of attacking the perpetuation of past purposeful racial discrimination" in voting. *Rome*, 446 U.S. at 176 (citing various opinions in *Mitchell*). Except for Justice Douglas, who believed that the legislation was authorized under Section 5 of the Fourteenth Amendment, *see Mitchell*, 400 U.S. at 144-147 (opinion of Douglas, J.), every member of the Court in *Mitchell* agreed that Congress had permissibly acted under its Fifteenth Amendment enforcement authority, *see id.* at 132-133 (opinion of Black, J.); *id.*

City's federalism challenge, the Court in *Rome* reaffirmed its holding in *Katzenbach* that "'the Fifteenth Amendment supersedes contrary exertions of state power.'" 446 U.S. at 180 (quoting *Katzenbach*, 383 U.S. at 325). Applying that principle, the Court concluded that "Congress had the authority to regulate state and local voting through the provisions of the Voting Rights Act," *id.* at 179, and that the Act was "'an appropriate means for carrying out Congress' constitutional responsibilities,'" *id.* at 179-180 (quoting *Katzenbach*, 383 U.S. at 308).

Following the 1982 reauthorization and shortly after its *Boerne* decision, this Court again sustained Section 5's constitutionality, holding in *Lopez* v. *Monterey County*, 525 U.S. 266, 283 (1999), that Section 5 is appropriate enforcement legislation that does not "usurp[] powers reserved to the States." The Court invoked *Katzenbach* and *Rome* to support its conclusion that Congress acted within its "authority under the Fifteenth Amendment" in requiring federal preclearance of the implementation of a voting change by a covered county in a non-covered State—even where the county's action was "nondiscretionary" under state law. *Id.* at 282.

Appellant does not contend that the Court's *Boerne* cases overrule *Katzenbach* and its progeny, nor could it credibly do so. Nor has *Boerne* displaced or altered *Katzenbach*'s approach for evaluating whether Section 5 is appropriate enforcement legislation. To the contrary,

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at 216 (opinion of Harlan, J.); *id.* at 232-234 (opinion of Brennan, White, and Marshall, JJ.); *id.* at 284 (opinion of Stewart, J., joined by Burger, C.J., and Blackmun, J.); *see also Rome*, 446 U.S. at 177 n.13.

the Court's *Boerne* cases have consistently embraced *Katzenbach* and *Rome* and pointed to Section 5 as a model of the proper use of congressional enforcement powers. In *Boerne* itself, the Court cited the VRA, including specifically Section 5, as the leading example of valid enforcement legislation. 521 U.S. at 525-527. And the Court's decisions following *Boerne* have similarly extolled Section 5 as a proper exercise of congressional enforcement authority, distinguishing Section 5 from various statutes held invalid. *See Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 639-640 (1999); *United States* v. *Morrison*, 529 U.S. 598, 626 (2000); *Board of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 536, 373-374 (2001).

This unbroken line of authority—from *Katzenbach* to the Court's three later decisions directly sustaining Section 5 as reauthorized, through the *Boerne* decisions' reaffirmance of those precedents—refutes any suggestion that *Katzenbach* or *Rome* or their analytical framework have lost their force.[8] Adherence to that

[8] Contrary to the suggestions of Appellant and its amici (Br. 27-28; Pacific Legal Foundation Amicus Br. 6-19; Mountain States Legal Foundation Amicus Br. 5-6, 10-20), the Court has never held that the *Boerne* test applies to all Fifteenth Amendment enforcement legislation. In support of this contention, Appellant and its amici note the Court's observations in certain *Boerne* decisions that the enforcement clauses of the Fourteenth and Fifteenth Amendments are "parallel," *Boerne*, 521 U.S. at 518, and "virtually identical," *Garrett*, 531 U.S. at 373, n.8. *See, e.g.*, Br. 28; Mountain States Legal Foundation Amicus Br. 5-6. The Court, however, made these observations in Fourteenth Amendment, not Fifteenth Amendment, cases. And it did so by way of demonstrating (1) the breadth, not the narrowness, of Congress's Fifteenth Amendment enforcement authority, *see Boerne*, 521 U.S. at 518 (under the Fifteenth Amendment, as under the Fourteenth, "[l]egislation … can fall within the sweep of Congress' enforcement power even if … it

framework is particularly warranted here because, in 2006, Congress legislated on the premise that the Court would continue to apply that framework.

2. Reauthorization of Section 5 involved a quintessentially legislative judgment about how to protect fundamental constitutional rights

Through the VRA, Congress has targeted official racial discrimination in voting, conduct at the heart of the Fifteenth Amendment's proscriptions. Above and beyond *stare decisis* considerations, applying the standard utilized in *Katzenbach* and *Rome* to Section 5 as reauthorized in 2006 is thus entirely consistent with the *Boerne* cases, which, like *Katzenbach*, *see* 383 U.S. at 324-327, recognize Congress's broad discretion in enforcing core constitutional rights. And, as the Court's cases further make clear, such discretion is reinforced where, as here, Congress acts to reauthorize a statute on the basis of its predictive judgments formed through experience with the statute's operation over many years.

Three times in the wake of *Boerne*, this Court has addressed legislation protecting classes or constitutional rights that trigger heightened judicial scrutiny, and each time it has upheld the law in question. *See*

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prohibits conduct which is not itself unconstitutional"), and (2) the limitations on Congress's Fourteenth, not Fifteenth, Amendment enforcement power, outside the context of race and voting, *see Garrett*, 531 U.S. at 373 (elucidating the ADA's shortcomings through a comparison to the VRA). As discussed in the next subsection, there are sound reasons for granting greater deference to Congress when it legislates under the Fifteenth Amendment as well as the Fourteenth.

Lopez, 525 U.S. at 283 (upholding 1982 reauthorization of Section 5); *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 728-729 (2003) (holding that Family Medical Leave Act is valid remedial legislation designed to combat gender discrimination in employment); *Tennessee* v. *Lane*, 541 U.S. 509, 529-533 (2004) (Title II of the ADA is a "reasonable prophylactic measure" as applied to courthouse access, denials of which warrant "searching" judicial review). By contrast, the Court has struck down, for failure to satisfy the congruence-and-proportionality test, statutes targeting classifications that receive only rational-basis review. *See Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 83-84 (2000) (age classifications); *Garrett*, 531 U.S. at 366-367 (disability classifications under Title I of the ADA). As Appellant concedes (Br. 35), these cases demonstrate that when the right or class at issue receives heightened scrutiny, Congress is due more deference when it assesses the need for and propriety of enforcement legislation. *See* J.S. App. 45. As *Boerne* teaches, "[t]he appropriateness of remedial measures must be considered in light of the evil presented." 521 U.S. at 530.

Here, Congress acted at the zenith of its enforcement authority in reauthorizing Section 5, because that provision addresses *both* the quintessential suspect classification (race) *and* the quintessential civil right (the franchise). First, Section 5 targets racial discrimination by state actors, conduct that goes to the core of both the Fourteenth and Fifteenth Amendments and receives the strictest judicial scrutiny.[9] Second, Sec-

[9] *See Johnson* v. *California*, 543 U.S. 499, 509 (2005); *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S.

tion 5 protects the right to vote, a fundamental right "preservative" of all others, *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886), such that "any alleged infringement of [it] must be carefully and meticulously scrutinized," *Reynolds* v. *Sims*, 377 U.S. 533, 562 (1964). *See also Bartlett* v. *Strickland*, No. 07-689, 2009 WL 578634, at *6 (U.S. Mar. 9, 2009) (stressing that the right to vote is "one of the most fundamental rights of our citizens"). Congress's factual judgments in favor of reauthorizing Section 5 are thus entitled to the greatest measure of respect. Congress's authority is fortified by the fact that Section 5 targets conduct that not only requires heightened scrutiny in two respects, but is also prohibited by two separate constitutional amendments—so strong is the constitutional imperative to eradicate voting-related racial discrimination. *See, e.g.*, *Rogers* v. *Lodge*, 458 U.S. 613, 624-628 (1982) (applying the Fourteenth Amendment to protect against race discrimination in voting).

Moreover, precisely because Section 5 addresses both racial discrimination and the right to vote, it does not raise any of the separation-of-powers concerns that this Court cited when it invalidated congressional legislation in *Boerne* and three subsequent decisions. In each of those cases, the Court concluded that the chal-

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252, 266 (1977); *cf. Lane*, 541 U.S. at 561 (Scalia, J., dissenting) ("Giving § 5 [of the Fourteenth Amendment] more expansive scope with regard to measures directed against racial discrimination by the States accords to practices that are distinctively violative of the principal purpose of the Fourteenth Amendment[.]"); *Mitchell*, 400 U.S. at 129 (opinion of Black, J.) ("Where Congress attempts to remedy racial discrimination under its enforcement powers, its authority is enhanced by the avowed intention of the framers of [the Civil War Amendments].").

lenged legislation was designed not to enforce Fourteenth Amendment rights that this Court had recognized, but to *expand* the substance of those rights in the teeth of contrary decisions by this Court. *See Boerne*, 521 U.S. at 532 (holding that Fourteenth Amendment remedial legislation must be "responsive to, or designed to prevent, unconstitutional behavior"); *see also id.* at 519-529, 536; *Garrett*, 531 U.S. at 365; *Kimel*, 528 U.S. at 81; *Florida Prepaid*, 527 U.S. at 647-648.

The concern expressed in these decisions is most likely to arise when Congress has legislated to enforce rights secured against the States only by the Fourteenth Amendment. The Fourteenth Amendment encompasses a nearly limitless variety of constitutional challenges to state action; it not only contains primary prohibitions on discrimination, but also "functions as the vehicle through which various [other] rights … apply to the states." J.S. App. 48; *see, e.g.*, *Boerne*, 521 U.S. at 532 (finding constitutionally troublesome the "[s]weeping coverage" of RFRA, which was applicable to actions "of almost every description … regardless of subject matter"). Section 5 of the VRA does not raise that concern because it focuses exclusively on the *precise evil* addressed by the much more narrowly focused Fifteenth Amendment: race discrimination in voting.

In particular, unlike the provision held invalid in *Boerne*, Section 5 reflects a quintessentially legislative judgment about the type of remedy necessary to protect an *undisputed* constitutional right against an *undisputed* constitutional evil. After holding 21 separate hearings and compiling a legislative record of over 15,000 pages, Congress concluded that reauthorization of Section 5 was necessary to protect the "fragile" gains that minority voters have made in the covered jurisdic-

tions, *Rome*, 446 U.S. at 182 (internal quotation marks omitted). That judgment warrants "substantial deference" because Congress "is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions." *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 195 (1997) (internal quotation marks omitted). And that judgment is due even further deference than most congressional determinations because Congress was not legislating on a blank slate, but reauthorizing a statute already in effect based on its experience with the VRA's operation over many years. Congress's judgment that Section 5 remains necessary is thus precisely like the judgment upheld in *Rome* and unlike that at issue in any *Boerne* case.[10]

[10] Amici Dr. Abigail Thernstrom *et al.* argue that Section 5 is subject to strict scrutiny because, as amended by Congress, it allegedly mandates race-based districting. That contention is not properly before the Court because it was neither pursued nor passed upon below, *see, e.g.*, *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212-213 (1998), and because Appellant does not present it even on appeal, *see, e.g.*, *Robertson* v. *Seattle Audubon Soc.*, 503 U.S. 429, 441 (1992). Moreover, because that argument concerns only Section 5's application to re-districting, which this case does not involve, addressing it would require the Court to render an advisory opinion, *see Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), as the Thernstrom amici effectively concede (Br. 36-37). If any allegedly impermissible race-based districting occurs, a claim under *Shaw* v. *Reno*, 509 U.S. 630 (1993), would allow for federal court review.

B. Congress's 2006 Reauthorization Of Section 5 Was A Constitutionally Valid Means Of Seeking To Eradicate Racial Discrimination In Voting

Under either the standard that this Court applied to Section 5 in *Katzenbach* and *Rome* or the analysis articulated in *Boerne*, the 2006 record provided more than a sufficient basis on which Congress could determine that Section 5's prophylactic rules remain necessary in Texas and the other covered jurisdictions.[11]

1. The record before Congress provided ample basis for Congress to conclude that Section 5 is still needed to combat and deter voting-related discrimination in covered jurisdictions

As the 2007 sunset date approached on the prior reauthorization of Section 5, Congress undertook a searching examination of whether that provision should be allowed to expire. Congress held more than 20 hearings, heard testimony from dozens of witnesses, and compiled a lengthy record. Based on its extensive review, Congress concluded that allowing Section 5 to lapse would endanger the voting rights of minorities in covered jurisdictions. This Court's analysis in *Rome* and *Lopez*, on which Congress relied, confirms that Congress's conclusion was constitutionally sound.

In *Rome*, this Court rejected a claim, much like Appellant's here, that Section 5 had "outlived [its] usefulness" because "Negro voter registration had im-

[11] The brief of the Louis Intervenors addresses several aspects of the 2006 congressional record in greater detail, and we respectfully refer the Court to the discussion in that brief.

proved dramatically since 1965." 446 U.S. at 180. Acknowledging that substantial gains had been made, the Court nonetheless sustained Section 5 on the basis of three categories of evidence showing a continuing danger of voting-related discrimination in covered jurisdictions: (1) racial disparities in registration, (2) disproportionately low minority electoral representation, and (3) DOJ Section 5 objections. *See id.* at 180-182. During the hearings culminating in the 2006 reauthorization, Congress received substantial evidence in each of these categories, as well as a host of others. Notwithstanding the progress that had been made, there was evidence of substantial ongoing problems in each category—demonstrating the continuing need for Section 5.

First, as in 1975, Congress in 2006 found significant racial disparities in registration rates in a number of the covered and partially covered jurisdictions. J.S. App. 59-62. Gaps between Hispanics and non-Hispanic whites were particularly large in several covered States (J.S. App. 60-61; H.R. Rep. No. 109-478, at 29 (2006)), including, as Appellant acknowledges, a 16-point gap in registration rates between Hispanics and non-Hispanic whites in Texas. *See* Br. 50; J.S. App. 62. Congress also received evidence indicating that "in most of the covered Southern states, … black turnout continues to lag turnout of non-Hispanic whites." *Understanding the Benefits and Costs of Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 131 (2006) (supplemental testimony of Prof. Nathaniel Persily); *see also* J.S. App. 61.

Likewise, in 2006, as in 1975, Congress found that "gains by minority candidates remain[ed] uneven, both geographically and by level of office." J.S. App. 63. For example, no African-American had ever been elected to statewide office in Mississippi, Louisiana, or South

Carolina, despite the significant African-American populations in those States. H.R. Rep. No. 109-478, at 33. And in many fully covered jurisdictions, minority representation, even for lower offices, lagged well behind proportional levels. J.S. App. 63; H.R. Rep. No. 109-478, at 33. Appellant responds (Br. 51) that the lack of success by minorities in statewide elections should be ignored because "minorities are elected to local office." But *Rome* explained that it is constitutionally relevant whether the offices held by minorities are "relatively minor" or "statewide." 446 U.S. at 180. *Rome* also held that minority representation in the state legislatures that falls "far short of being representative" is evidence of continuing discrimination. *Id.* at 181.

In the 2006 reauthorization, Congress also followed this Court's guidance in *Rome* by examining "the number and nature of objections interposed by the Attorney General." 446 U.S. at 181. This examination revealed: that DOJ interposed more objections between 1982 and 2004 (626) than between 1965 and 1982 (490), including objections to at least one statewide change in every fully covered State and in most partially covered States (J.S. App. 66, 69-71); that between 1980 and 2000, 421 objections were lodged on the basis of DOJ's determination that the proposed voting change was motivated by a state actor's discriminatory purpose (J.S. App. 77); and that DOJ has objected to more proposed changes from Texas than from any other State (H.R. Rep. No. 109-478, at 73).[12] These objections pre-

[12] The Southeastern Legal Foundation asserts baldly (Br. 28 n.15) that the acts of discrimination identified by Congress "were clearly based on findings of disparate impact." *See also* Scharf-Norton Center Amicus Br. 11 (arguing that many objections were

empted a wide variety of attempted discriminatory changes, including discriminatory redistricting plans, switching offices from elected to appointed positions, enacting discriminatory annexations, setting numbered posts, and switching from single-member to at-large voting systems while implementing majority vote requirements. H.R. Rep. No. 109-478, at 36.

Appellant responds (Br. 52-53) to the record evidence of the hundreds of attempted acts of intentional official discrimination by emphasizing that the overall objection rate under Section 5 is low. This, too, overlooks *Rome*, where the Court sustained the reauthorization even though by 1978 the DOJ objection rate had fallen to 0.8% percent, a fraction of the objection rate immediately following initial passage of the VRA. J.S. App. 64. *Rome* confirms that what is pertinent is not the objection *rate*, but rather the evidence of continuing discrimination as reflected in the volume and nature of attempted discriminatory acts. The hundreds of attempted acts of intentional race-based voting discrimination since the 1982 reauthorization—even with Section 5 in place—gave Congress more than adequate grounds to conclude that Section 5 remains needed to protect minority voters. *See Rome*, 446 U.S. at 181.

Congress also properly took into account a wide variety of other types of evidence demonstrating a danger of ongoing vote-related discrimination in covered jurisdictions. J.S. App. 81-108. For example, several hun-

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not in response to genuine acts of discrimination). But it was Congress's prerogative to resolve disputed factual questions arising from the record before it, and Congress credited evidence showing that intentional discrimination is an ongoing and serious problem. *See* H.R. Rep. No. 109-478, at 36.

dred proposed voting changes were withdrawn, not acted upon, or superseded following requests by DOJ for more information (MIRs). J.S. App. 82. And the proposed voting changes that were withdrawn following MIRs came "primarily" from jurisdictions in southern States with a substantial concentration of African-American voters. H.R. Rep. No. 109-478, at 41. Congress reasonably concluded that these withdrawals were "often illustrative of a jurisdiction's motives." *Id.* at 40. Congress further found that the credible threat of misconduct has led the Attorney General to assign 300 to 600 election observers to covered jurisdictions annually since 1982. J.S. App. 103. Likewise, Congress found that racially polarized voting remains a significant phenomenon in covered jurisdictions. J.S. App. 106-107.[13]

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[13] By itself, of course, racially polarized voting does not constitute state action. However, this Court has recognized that racially polarized voting is what makes possible the discriminatory use of various kinds of voting changes that, although neutral on their face, can be and have been used to "nullify" the ability of minority voters "to elect the candidate of their choice." *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 569 (1969); *see also Rome*, 446 U.S. at 183 (proposed "electoral changes … when combined with the presence of racial bloc voting and *Rome*'s majority white population and at-large electoral system, would dilute Negro voting strength"). Furthermore, the presence of racially polarized voting may provide circumstantial evidence that voting changes bearing more heavily upon minority voters were selected by elected officials in response to racially discriminatory sentiment or pressures in the electorate. *See Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982) (racial bloc voting "allows those elected to ignore black interests without fear of political consequences"). Conversely, in the absence of racially polarized voting, adoption of such changes presents far less of a concern because the factual predicate for either a racially discriminatory purpose or a retrogressive effect will likely

In addition, the record before Congress included, for the period since 1982, evidence of "at least 105 successful Section 5 enforcement actions" (J.S. App. 89) and at least 653 successful Section 2 suits in the nine fully covered States. J.S. App. 95.[14] Congress took particular note of one of those Section 2 violations—namely, the one adjudicated by this Court in *League of United Latin American Citizens* v. *Perry*, 548 U.S. 399 (2006). In that decision, which Congress considered as it contemplated reauthorization of Section 5, the Court found that a Texas redistricting plan "b[ore] the mark of intentional discrimination that could give rise to an equal protection violation." *Id.* at 440.

Finally, Congress heard and credited expert testimony and other evidence that Section 5 has *deterred* discrimination in covered jurisdictions. *See* H.R. Rep. No. 109-478, at 36 (Section 5 is responsible for many "discriminatory voting changes … hav[ing] never materialized"); *see also* J.S. App. 108-112. Since, as Congress found, it is Section 5 that has prevented covered jurisdictions from engaging in racial discrimination, Congress also reasonably concluded that the "progress"

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not be present. Thus, not only were Congress's racially polarized voting findings justified, but Congress would have been remiss had it merely assumed that racially polarized voting still exists or had it simply disregarded the issue.

[14] 206 of these Section 2 enforcement suits were filed against Texas jurisdictions, the largest number for any covered State. *Voting Rights Act: Evidence of Continued Need, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 206-207 (2006) (appendix to statements of Bill Lann Lee & Joe Rogers, "Protecting Minority Voters: The Voting Rights Act at Work, 1982-2005," a report by the National Commission on the VRA).

brought about by Section 5 would be "jeopardized" were the provision allowed to lapse. H.R. Rep. No. 109-478, at 57; *see Rome*, 446 U.S. at 177 (holding that a legitimate basis for reauthorization is to "preserve the … achievements" of the VRA).[15]

Taken together, the many categories of record evidence amply supported Congress's judgment that racial discrimination in voting remains a problem in the covered jurisdictions, including, without doubt, in Texas.

2. Appellant's challenges to Congress's legislative discretion are without merit

Appellant argues that the extensive record before Congress was inadequate to support reauthorization because it does not show the specific kind of discrimination needed to justify Section 5. According to Appellant (Br. 40, 61), preclearance is constitutionally per-

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[15] Contrary to Appellant's suggestion (Br. 1), the election of President Obama in no way undermines the record of official race-based discrimination in voting before Congress in 2006. Though undeniably a signal of racial progress, the 2008 election has not changed the fact that "[m]uch remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions." *See Bartlett* v. *Strickland*, No. 07-689, 2009 WL 578634, at *16 (U.S. Mar. 9, 2009) (Kennedy, J., plurality op.). Moreover, the 2008 election, in which the President won only a single fully covered State, only illustrates the sizeable gap between covered jurisdictions and the rest of the country in terms of the degree of racial differences in voting patterns between white and minority voters. *See* Persily Amicus Br. 3 ("[I]n 2008 race played a greater role in vote choice in the covered than in the noncovered jurisdictions."); *id.* at 18 ("[E]ven when one controls for past vote for the Democratic presidential nominee, the effect of race on vote choice remains, as does the greater influence of race in the covered jurisdictions.").

missible only as a remedy against the concerted effort by covered jurisdictions to "game the system to the disadvantage of minorities by acting preemptively to impose new barriers to voting once old barriers are judicially deemed unenforceable" or as a response to an "acute emergency." There is no merit to this argument. This Court upheld Section 5's constitutionality in both *Rome* and *Lopez* without requiring evidence of ongoing gamesmanship—let alone an "acute emergency"—in covered jurisdictions.

As *Rome* makes clear, a decision to reauthorize Section 5 is justified by evidence that voting discrimination persists in covered jurisdictions and is difficult to uproot solely through conventional, reactive litigation. *See* 446 U.S. at 181-182. No showing of "gamesmanship" is necessary. Thus, in *Lopez*, the Court upheld Section 5 even though it was there applied to prohibit a separately covered county from implementing a voting change that state law *required* it to make, and even though the State whose law was at issue—California—is not itself a covered jurisdiction. In upholding Section 5's constitutionality in that context, the Court never suggested that any showing of "gamesmanship" was even relevant to the inquiry. *See* 525 U.S. at 282-285.

Similarly, *Katzenbach* never suggested that gamesmanship was a condition-precedent of Section 5's constitutionality. Rather, as the Court explained, gamesmanship was one component of a much larger problem—the inadequacy of case-by-case litigation as a remedy for deeply rooted discrimination that impairs minority voting rights. *See* 383 U.S. at 313-315, 328; *see also* J.S. App. 128. The Court explained that case-by-case litigation was inadequate not only because of gamesmanship, but also because "[v]oting suits are un-

usually onerous to prepare," litigation is "exceedingly slow," the "burden is too heavy," and "the wrong to our citizens is too serious." 383 U.S. at 314, 315; *see also Boerne*, 521 U.S. at 526 (stressing that Section 5 was necessary because of "the slow, costly character of case-by-case litigation"). In reauthorizing Section 5, Congress concluded that case-by-case litigation remains inadequate by itself to enforce minority voting rights, H.R. Rep. No. 109-478, at 57, and that, given the evidence of continued discrimination in covered jurisdictions, Section 5 remains necessary. Those findings are entitled to considerable deference.[16]

Likewise, no "acute emergency" (Br. 61) is required before Congress may reauthorize Section 5 because such prophylactic remedies are by definition designed to prevent any emergency from recurring in the first place. Here, too, this Court's precedents foreclose any contrary conclusion. For example, although the Court noted in *Rome* that "Negro voter registration had *improved dramatically* since 1965," 446 U.S. at 180 (emphasis added), it upheld the reauthorization of Section 5 because Congress reasonably concluded that reauthorization "was necessary to *preserve* the 'limited and fragile' achievements of the Act." *Id.* at 182 (emphasis added). And in *Lopez*, 525 U.S. at 282-285, this Court

[16] In any event, the House Committee Report concluded regarding the 1982 to 2006 period that "voting changes devised by covered jurisdictions resemble those techniques and methods used in 1965, 1970, 1975, and 1982." H.R. Rep. No. 109-478, at 36. For example, as recently as 2004, a municipality in Texas "while losing or settling a series of lawsuits, repeatedly sought to block students attending an historically black university from voting." J.S. App. 131. This evidence is more fully addressed in the brief for the Louis Intervenors.

upheld Section 5 in 1999 without remotely suggesting that Congress needed to demonstrate an ongoing "emergency" when it reauthorized Section 5 several years after *Rome* was decided. There is no basis for concluding otherwise on this record, now that Congress has determined once more that this preventive measure needs to be retained.

Appellant argues that in the absence of gamesmanship or an emergency, affirmative Section 2 litigation is an adequate means of addressing voting discrimination. Br. 40-41. But Congress specifically considered whether post-hoc litigation alone would provide sufficient protection to minority voters in covered jurisdictions and found that approach "inadequate." H.R. Rep. No. 109-478, at 57. This finding is unsurprising because Section 2 litigation in the covered jurisdictions, unaccompanied by the filtering function of Section 5, has several shortcomings.

First, without preclearance, discriminatory voting practices would go into immediate effect, putting the burden of "time and inertia" on minority voters, *Katzenbach*, 383 U.S. at 328, rather than on jurisdictions with an established historical record of racial discrimination in voting. As in prior reenactments, Congress decided to protect minority citizens from even a temporary impairment of this most fundamental of civil rights during the sometimes prolonged period needed to bring and ultimately prevail in Section 2 litigation.

Second, Congress noted that a repeal of Section 5 would "reverse the burden of proof" in voting cases, forcing the victims of discrimination to demonstrate that they have been harmed. H.R. Rep. No. 109-478, at 66. And Congress heard further testimony that Section 2 cases are particularly resource-intensive to litigate

and difficult to win. *See, e.g.*, *Understanding the Benefits and Costs of Section 5 Pre-clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 80 (2006) ("The Federal Judicial Center studies the complexity of different types of cases, and has reported that voting cases rank near the top of all civil cases in complexity. In [the] recent Charleston County case, the County spent over $2,000,000 defending the [Section 2] case, and [the plaintiff's lawyers] had to put in over 2000 hours … in addition to many more hours that the Justice Department put in.") (supplemental testimony of Armand Derfner) (citation omitted). Section 5 complements Section 2 by prescreening voting changes, and it thereby often spares minority groups the substantial costs of pursuing after-the-fact litigation.

Finally, the adequacy of Section 2 cannot be properly evaluated without accounting for the additional discriminatory voting changes that would have been implemented in the *absence* of Section 5's deterrent effect. *See supra* pp. 38-39. If the preclearance remedy were eliminated, more discriminatory voting measures would take effect, and more Section 2 lawsuits would need to be filed. Exclusive reliance on such post-hoc litigation would thus not only impose burdens on voters seeking to stop discriminatory acts, but also, in Congress's considered judgment, require them to bear that burden more often.

3. Section 5 remains appropriately tailored to the harms of voting-related racial discrimination

a. Section 5 is geographically tailored

Section 5 targets "those regions of the country where discrimination had been most flagrant." *Boerne*, 521 U.S. at 532-533. Appellant contends (Br. 56-61),

however, that Section 5 is not geographically tailored enough because Congress used a coverage formula last amended in 1975 as the basis for triggering Section 5 coverage under the VRARA. That argument is without merit. Congress enacted Section 5 to prevent certain jurisdictions with the longest and worst histories of discrimination from resuming discriminatory practices. The coverage formula, in turn, identifies the jurisdictions with such histories. In the VRARA, Congress thus quite properly relied on the same coverage formula, but it also relied on recent evidence confirming that official voting-related discrimination continues in those jurisdictions. And Congress properly looked to the bailout and bail-in provisions to ensure that coverage evolves with the track record of each covered (or potentially covered) jurisdiction.

Congress's careful survey in 2006 of the recent history of voting discrimination in covered jurisdictions yielded a wealth of recent record evidence indicating a substantial basis for ongoing concern in those jurisdictions where opposition to minority voting has historically been most persistent. To be sure, conditions in covered jurisdictions are no longer as bad as they were in 1965, as Appellant argues (Br. 42-43). But Congress was entitled to conclude that Section 5 remains necessary for an additional temporary period in the covered jurisdictions in light of (1) the egregious conditions in 1965, (2) the record of ongoing discrimination in the covered jurisdictions from 1982 to 2006, and (3) the fact that, in many cases, those jurisdictions have made pro-

gress since 1965 precisely *because* Section 5 was on the books.[17]

Appellant downplays the evidence of continuing discrimination in covered jurisdictions by suggesting that there are analogous abuses in non-covered States. Br. 50-51. But misconduct in the covered jurisdictions is no less pernicious simply because discrimination may sometimes occur in non-covered jurisdictions too. The Court has never before required an explanation of Congress's choice *not* to cover certain jurisdictions as a prerequisite to sustaining the Act's constitutionality. Indeed, *Katzenbach* specifically held that it "is irrelevant that the coverage formula excludes certain localities … for which there is evidence of voting discrimination." 383 U.S. at 330-331. If Congress may enact na-

[17] Contrary to Appellant's argument (Br. 61), Congress appropriately tailored Section 5 to the constitutional harm at issue by scheduling it to sunset in 25 years. *See Boerne*, 521 U.S. at 533 (noting that "termination dates" can help tailor legislation). In *Lopez*, this Court affirmed the constitutionality of the 1982 reauthorization without suggesting that the 25-year extension in that provision was in any way problematic. And indeed, the decision over the appropriate length of the time to extend a statute is a "quintessentially legislative judgment." J.S. App. 117. As this Court has observed in another context with regard to statutory extensions, the judiciary is "not at liberty to second-guess congressional determinations and policy judgments of this order." *Eldred* v. *Ashcroft*, 537 U.S. 186, 208 (2003). In any event, Congress had good reasons to choose a 25-year period for this extension. Congress specifically considered a shorter extension but ultimately concluded that an extension covering two census cycles would be more appropriate because it provides an incentive for covered jurisdictions to establish the ten-year track record needed for bailout and provides a future Congress with a sufficient record for evaluating the need for any further reauthorization. J.S. App. 116-117, 143.

tional legislation in response to evidence of unconstitutional conduct in only certain jurisdictions, *see, e.g.*, *Hibbs*, 538 U.S. at 729-735, surely Congress may confine the scope of remedial legislation to those jurisdictions, such as Texas, where both history and recent experience confirm that such legislation is most needed.

Moreover, if the data underlying the coverage formula were "obsolete," as Appellant contends (Br. 60), then differences between covered and non-covered jurisdictions should have evaporated. Yet, as the district court correctly found, "[t]he legislative record reveals significant differences between covered and non-covered jurisdictions." J.S. App. 138. A study before Congress indicated that Section 2 challenges are brought at a higher rate relative to population in covered jurisdictions, and that those suits are more often successful than suits brought in non-covered States. *Id.* This disparity is all the more remarkable given that Section 5 itself has deterred or blocked additional discriminatory voting changes in covered jurisdictions, thereby masking the true degree of difference between covered and non-covered jurisdictions.

b. Section 5 is tailored to minimize its federalism costs

Finally, Section 5 is tailored to the evidence of discrimination assembled in the 2006 record because the preclearance remedy has several features designed to minimize its federalism costs—features that further distinguish Section 5 from the statutes invalidated in the *Boerne* cases.

First, the 2006 record overwhelmingly concerns voting procedures enacted and enforced by state actors. Section 5, therefore, does not raise any concern,

such as those noted by the Court in the *Boerne* cases, that Congress might have relied on evidence of misconduct by society generally, as opposed to unconstitutional conduct by public authorities. *See, e.g.*, *Garrett*, 531 U.S. at 369 (the vast majority of evidence before Congress related to societal discrimination, as opposed to discrimination by state actors); *Kimel*, 528 U.S. at 90 (Congress's findings of substantial age discrimination in the private sector were "beside the point" where Congress "made no such findings with respect to the States"); *Florida Prepaid*, 527 U.S. at 640 (finding that in contrast to voting rights cases, "Congress came up with little evidence of infringing conduct on the part of the States").

Second, Section 5 contains no provision authorizing private citizens to recover money damages from state or local treasuries. It has been suggested that, when Congress authorizes private suits against States for money damages under the Fourteenth and Fifteenth Amendments, the need for Congress to avoid the redefinition of constitutional rights "has special force," and that "[t]hese basic concerns underlie cases such as *Garrett* and *Kimel*." *Hibbs*, 538 U.S. at 744 (Kennedy, J., dissenting); *see also Alden* v. *Maine*, 527 U.S. 706, 750-751 (1999); *Kimel*, 528 U.S. at 67; *Florida Prepaid*, 527 U.S. at 646; *Garrett*, 531 U.S. at 376 (Kennedy, J., concurring). In contrast with the provisions at issue in *Garrett*, *Kimel*, and *Hibbs*, Section 5 imposes no monetary liability, and for voting changes that have a nondiscriminatory effect and intent, typically causes no more than a short, temporary delay in the covered jurisdiction's implementation of the change.

Third, the record before Congress made clear that the burden of complying with Section 5 is generally not onerous. While there may be a few preclearance sub-

missions that require more significant resources, *see* Br. of Hon. Bob Riley 17-22, an election official from North Carolina testified that most Section 5 submissions "are routine matters that take only a few minutes to prepare," *Reauthorizing the Voting Rights Act's Temporary Provisions: Policy Perspectives and View From the Field: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Property Rights of the S. Comm. on the Judiciary*, 109th Cong. 313 (2006) (statement of Donald Wright), and that "preclearance requirements … do not occupy an exorbitant amount of time, energy or resources," *id.* at 13.

The record in this case bears out that observation. Complying with Section 5 has imposed almost no burden on Appellant. Section 5's preclearance requirement has cost Appellant an average of only $223 per year, amounting to less than one-tenth of one percent of its average annual expenditures. J.A. 268-270, 272, 274-275. Nor has compliance imposed any administrative burden on Appellant or its board members. J.A. 51, 57-58 (testimony of former general counsel, who prepared all but one of Appellant's Section 5 submissions: "I don't think I ever had one of the board members take a look at [a] submission."); J.A. 35-37, 41 (testimony of former Board President that he "flipp[ed] through" a draft submission, but noted no comments, and that in his estimation the Board spends only 1/1000th of its time on Section 5 compliance). Section 5 compliance also has never prevented Appellant from implementing a voting change on time. J.A. 22-23, 39-40, 59.

The complete absence of state or local governmental opposition to the reauthorization of Section 5 also speaks volumes. In the reauthorization proceedings before Congress, no witness for any governmental entity testified against reauthorization. To the contrary,

a coalition of organizations representing the interests of thousands of elected state and local officials advocated for renewal of the VRA's enforcement provisions. 152 Cong. Rec. H5143, H5146 (daily ed. July 13, 2006). Congressional delegations representing the covered jurisdictions also voted overwhelmingly for Section 5's reauthorization. *Id.* at H5207.

Likewise, in this litigation, neither Texas, nor any other covered State, nor any of the hundreds of covered local jurisdictions, has filed an amicus brief supporting Appellant's contentions.[18] Indeed, Appellant's home county, Travis County, intervened in this case as a defendant, stressing that the "administrative costs associated with Section 5 compliance … are outweighed by the valuable benefits to the County and its voters that come with the continued existence and application of Section 5."[19] That practical judgment, shared by so many other covered jurisdictions as well as Congress and DOJ, underscores both the value of and the continued need for this vital civil rights provision.

CONCLUSION

The judgment of the district court should be affirmed.

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[18] The Governor of Georgia filed a brief in support of Appellant on behalf of himself, and not his State. The Governor of Alabama filed a brief in support of no party, and on behalf of himself.

[19] Travis County Intervention Mot., Dkt. No. 23, at 3 (Nov. 6, 2006).

Respectfully submitted.

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